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In The
Supreme Court of the United States

McCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioners

v.

STEVE SISOLAK

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; THE NATIONAL BUSINESS AVIATION ASSOCIATION, INC.; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

This Court's Review Is Necessary Because The Nevada Court's Ruling Is Contrary To The Longstanding Federal Legal Standard Governing Airspace That Is Critical To Safe Takeoffs And Landings Throughout The National Aviation System 6

I. The Finding Of A *Per Se* Taking In This Case Was Wrong And, If Left Unreviewed, Will Threaten The National Aviation System Without Regard To Well-Established Federal, Local, And Private Interests 7

A. Respondent's Property Is Not Physically Invaded And Retains Substantial Economic Use And Value, Which Makes A *Per Se* Taking Analysis Inapplicable 8

B. The Ruling Of A *Per Se* Taking Is Error Because It Is Contrary To Longstanding Federal Law And Policy On Which The Land Regulation Was Based And *Amici* Have Relied 9

C. The *Per Se* Taking Ruling Imperils the National Aviation System And Undermines The Predictability And Reliability Of That System On Which Both Commerce And Individual Passengers Rely 14

TABLE OF CONTENTS – Continued

Page

II. The *Penn Central* Analysis Applies To Safety-Based Height Limitations Near Runways Because It Takes Into Account The Reasonable Investment-Backed Expectations Of The Landowner And The Character Of The Regulation Of Airspace 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 20

Griggs v. Allegheny County, 369 U.S. 84 (1962) 8

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 19

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 9

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 5, 18, 19

Suburban O'Hare Commission v. Dole, 787 F.2d 186 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986) 18

United States v. Causby, 328 U.S. 256 (1946) 8

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 8

STATUTES AND REGULATIONS:

49 U.S.C. § 40101(a)(3) 10

49 U.S.C. § 40101(a)(14) 10

49 U.S.C. § 40102(a)(32) 10

49 U.S.C. § 40103(a)(2) 10

49 U.S.C. § 47101(a)(1) 10

49 U.S.C. § 47101(a)(7) 10

49 U.S.C. § 47101(a)(8) 10

49 U.S.C. § 47107(a)(10) 11

49 U.S.C. § 47502(3) 12

49 U.S.C. § 47503 12

TABLE OF AUTHORITIES – Continued

Page

Civil Aeronautics Act of 1938, Pub. L. 75-706, 52 Stat. 973 (1938) 9

14 C.F.R.:
Pt. 77 11
§ 77.13 12
§ 77.31-.39 12
§ 91.119(c) 4, 10, 13
Pt. 150 12
§ 150.21 12

MISCELLANEOUS:

FAA, *Advisory Circular: Noise Control and Compatibility Planning for Airports*, A/C 150/5020-1 (1983) 12

FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K (2000) 4, 13

David Hasemyer, *Is Office Tower's Height A Hazard?*, The San Diego Union-Tribune, Nov. 5, 2006 16

Elsa Brenner, *Many Private Planes To Store, But Not Enough Hangars*, The N.Y. Times, Dec. 27, 2006 19

Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, The Las Vegas Sun, May 28, 2003 15

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; THE AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; THE NATIONAL BUSINESS AVIATION ASSOCIATION, INC.; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Air Line Pilots Association, International, the Air Transport Association of America, Inc., the Aircraft Owners and Pilots Association, the Airports Council International-North America; the National Business Aviation Association, Inc., and the Regional Airline Association respectfully submit this brief as *amici curiae* in support of petitioners.

INTERESTS OF *AMICI CURIAE*[1]

The various *amici* and their members have a vital interest in protection of the public's right to transit navigable airspace in a manner that ensures public safety and security. If allowed to stand, the Nevada Supreme Court decision in this case, and its errant legal analysis, will have a significant adverse impact on the airports of the United States and the interests of the national and regional airlines, the aircraft owners, and the pilots, whose daily use of those airports is central to the nation's economy and to the travel needs of tens of millions of Americans.

The Air Line Pilots Association, International (ALPA) is a labor union that represents 61,000 professional airline pilots at 40 air carriers in the United States and Canada. ALPA's members operate at all air carrier airports in the

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[1] Letters from petitioners and respondent providing written consent to the filing of this brief are being filed with the Clerk of this Court along with this brief, in accordance with Rule 37.3. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

United States including McCarran International Airport. ALPA's motto is "schedule with safety" and ALPA is recognized in the airline industry for its contributions to flight safety.

The Air Transport Association of America, Inc. (ATA) is the principal trade and service organization of the major scheduled air carriers in the United States. ATA's members annually serve approximately 600 million passengers and transport millions of tons of air cargo in the National Aviation System, including most of the visitors and cargo entering McCarran International Airport in Las Vegas, Nevada. ATA members provide vital air services on which the traveling public and business community have come to rely.

The Aircraft Owners and Pilots Association (AOPA) is a nationwide membership association of more than 400,000 individual pilots and aircraft owners. AOPA members fly and own most of the civil aircraft fleet of the United States ranging from light sport aircraft to large turbojet aircraft. This segment of aviation is commonly known as "general aviation." In terms of hours flown, general aviation accounts for more than half of civil flying in the National Aviation System. General aviation utilizes McCarran International Airport and all other civilian airports in the country.

The Airports Council International-North America (ACI-NA) is a trade association representing the state, regional and local government bodies, including Clark County, Nevada, that own and operate the principal airports served by scheduled air carriers in the United States and Canada. The 135 ACI-NA member airports in the United States handle approximately 95 percent of the domestic and international air passenger traffic in the United States.

The National Business Aviation Association, Inc. (NBAA) is a membership association of more than 8,000 members who operate aircraft for business purposes within the United States and internationally. NBAA members operate about 9,000 aircraft ranging from single piston engine to complex, high performance aircraft to and from the approximately 5,000 public airports in the United

States. NBAA members use McCarran International Airport on a daily basis and the association has held its annual meeting and convention in that city using the airport as a place to display aircraft.

The Regional Airline Association (RAA) represents short-haul scheduled airlines providing service primarily between small- and medium-sized communities and the nation's hub airports. RAA's 43 member airlines serve 99 percent of the airports in the United States with scheduled commercial service, including McCarran International Airport, and transport 97 percent of the passengers carried by regional airlines.

SUMMARY OF ARGUMENT

The holding by the Nevada Supreme Court that a local restriction on building height, which still would have permitted at least a four-story hotel and casino to be built on the relevant land parcel, was a *per se* taking of property requiring millions of dollars in compensation is wrong. If left uncorrected, that ruling will threaten our National Aviation System, *i.e.,* the complex and interdependent nationwide network of airports and airways, on which the *amici*, the nation's businesses, large and small, and the traveling public rely. This Court's review is necessary because the Nevada court's ruling contradicts this Court's established takings jurisprudence, as well as the federal law and policy governing airspace that is critical to safe takeoffs and landings throughout that National Aviation System. *Amici*, who represent every segment of the air transportation industry, have come together in this unprecedented expression of common purpose to urge review by this Court to avoid such adverse consequences.

I.

A. The Nevada Supreme Court's ruling creates a huge degree of uncertainty for the air transportation industry and local governments that seek the benefits of air commerce for their communities. The county ordinances at

issue restricted certain, but not all, construction on respondent's land. Respondent's property is not physically invaded and retains substantial economic use and value, which makes a *per se* taking analysis inapplicable. The court's contrary ruling on this issue, however, engenders confusion and possible efforts to impose such analysis elsewhere in similar instances.

B. Ownership of navigable airspace over privately-held property is subject to the public right of transit through that airspace. This well-settled legal view undergirds the substantial investments in, and development of, our nation's airports, their runways, and the airlines and private aircraft operators who use them. It has produced the safest, most efficient, and most productive engine of air commerce and travel in the world.

Current federal law defines navigable airspace in uncongested areas as all airspace above 500 feet above ground level (AGL) and airspace below 500 feet AGL that is necessary for safe takeoff and landing. 14 C.F.R. § 91.119(c). Whether nonaviation usage of airspace below 500 feet AGL can be accommodated without a decrease in the safety and capacity for takeoffs and landings must be determined on a case-by-case basis. In most instances, if the FAA determines that proposed construction may pose a safety concern, local land use authorities look to that determination to ascertain the extent of use that is consistent with public safety and welfare. The interested parties then negotiate a solution that best meets the needs of the various interests at stake. *See* FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K at 6 (2000).

The court below did not correctly construe this federal law or policy. The court treated the airspace below 500 AGL as if the federal scheme placed that airspace exclusively in private hands, regardless of whether such airspace is necessary for safe takeoff and landing. This interpretation reads out of federal law the qualifying language regarding lower airspace necessary for safe

takeoff and landing. The ruling dramatically changes the legal landscape for every *amicus*.

C. Where airports may be liable, or are uncertain about the risk of liability, for a *per se* taking based on *any* building restriction, no matter how reasonable, they are likely to delay or cancel airport improvements and capacity enhancements. When such airports do not operate at, or near, capacity because of fear of takings liability, neighboring airport operators may not be able to keep up with regional demand. The creation of such uncertainty in the capacity and development of our National Aviation System will have direct and indirect adverse effects on commerce and the traveling public.

II.

The three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is the appropriate analysis to determine whether petitioners' safety-based height limitations near runways constituted a taking. Unlike the *per se* taking analysis adopted by the Nevada Supreme Court, the *Penn Central* analysis allows a court to determine whether petitioners struck an appropriate balance between accommodation of nonaviation usage of navigable airspace and prevention of such usage if it would decrease the safety and capacity of the airspace and airport system.

A. Petitioners' height restriction did not interfere with respondent's reasonable investment-backed expectations. McCarran International Airport is typical of many airports where local authorities built the airport far away from substantial development, but development grew around the airport. In such circumstances, the landowners have no reasonable expectation of developing their property without regard for the operations of the airport, especially when the landowners benefited from the airport's development in the first place.

B. Regulation of building height near airport runways to eliminate obstructions to safe navigation of the public airspace does not possess the character of a taking. Height restrictions impose a limited economic burden that

promotes the common good by safeguarding the life and property of both those who travel in aircraft and those who occupy the buildings below.

Height restrictions that reflect federal criteria also promote the common good because they support a national standard. Such a system of cooperative federalism cannot function if courts and juries are able to impose massive fiscal liability, as in the instant case, on state or local entities that seek to comply with the views of the FAA. The risk of such massive liability would discourage thousands of state and local entities that have zoning authority near airports from adoption or enforcement of land use standards that protect the safe and efficient operation of the national air transportation system.

ARGUMENT

This Court's Review Is Necessary Because The Nevada Court's Ruling Is Contrary To The Longstanding Federal Legal Standard Governing Airspace That Is Critical To Safe Takeoffs And Landings Throughout The National Aviation System

Amici represent every segment of the air transportation industry – airport owners, pilots, commercial airlines, regional air carriers, business aircraft owners, and private aircraft owners. These entities often have divergent interests, but have come together in this unprecedented expression of common purpose to urge review by this Court. They do so because the decision below is wrong and, if left unreviewed, would threaten the integrity of the National Aviation System, *i.e.*, our complex and interdependent nationwide network of airports and airways, on which the *amici*, the nation's businesses, large and small, and the traveling public rely. The ruling below jeopardizes the right of public transit through the nation's navigable airspace. This right of public transit is a vital element underlying the comprehensive system of judicial rulings, legislative enactments, and agency rulemakings

that, together, have brought certainty, safety, and growth to our national network of airports and to our economy.

I. The Finding Of A *Per Se* Taking In This Case Was Wrong And, If Left Unreviewed, Will Threaten The National Aviation System Without Regard To Well-Established Federal, Local, And Private Interests

The Nevada Supreme Court's ruling creates a huge degree of uncertainty for the air transportation industry and local governments who seek the benefits of air commerce for their communities. It gives a single landowner, who knowingly purchased land near a major airport runway and whose land retains significant economic use and value, the ability to extract an exorbitant sum of money from a publicly-owned airport merely because possible future construction on his land was limited by a county height regulation to ensure the safe operation of aircraft to and from McCarran International Airport. The ruling below appears to open the door to comparable demands by other landowners seeking the same windfall.

The uncertainty created by the decision below is likely to affect adversely continuing efforts to enhance safety and flight capacity. If airports are now foreclosed from adopting reasonable zoning restrictions and instead are required to purchase all airspace necessary to ensure access to the National Aviation System, those expenditures would substantially reduce the funds available for airport improvements that enhance safety and flight capacity. The ruling will also have a chilling effect on the adoption of future regulations designed to protect airports from encroachments that could jeopardize safety and constrain capacity.

The impact will not be limited to Nevada. Any airplane passenger whose coast-to-coast travel has been disrupted due to inclement weather in Chicago or Denver knows full well the interdependent nature of our National Aviation System. Moreover, the ruling casts a long shadow, which likely will affect investment, over the development

plans and operations of other airports and of communities in other States who want such airports.

A. Respondent's Property Is Not Physically Invaded And Retains Substantial Economic Use And Value, Which Makes A *Per Se* Taking Analysis Inapplicable

The challenged county ordinances do not result in any physical occupation of respondent's land. They impose only a limit, subject to variance, on the height of structures that can be built on the property. As this Court explained 80 years ago in its seminal decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), there is "no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits."

The continuing economic use and value of the land, and the myriad commercial uses for which it remains available, fatally undermines the lower court's determination that petitioners' actions constituted a *per se* taking. Authorization for a variance had, in fact, been granted for the construction of a four-story, 66-foot high, 600-room resort hotel and casino on the land, but that alternative was not pursued. Pet. App. 5a-6a. Respondent sought no additional variances and did nothing to work with petitioners toward an agreement that would have met all the relevant interests at stake. Instead, he filed this suit claiming a *per se* taking and sought millions of dollars in compensation.

In *United States v. Causby*, 328 U.S. 256 (1946), and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), this Court adopted the general rule that "[f]lights over private land are not a taking." 328 U.S. at 266. The Court noted that a taking may occur where flights are "so low and so frequent" that they render the subject property uninhabitable or destroy existing businesses on the property, but respondent did not prevail on such a claim here. In fact, respondent stipulated to the dismissal of the portion of his complaint that alleged that his property was affected in this way by the flights.

Pet. App. 9a. Thus, these cases cannot support the Nevada court's ruling.

B. The Ruling Of A *Per Se* Taking Is Error Because It Is Contrary To Longstanding Federal Law And Policy On Which The Land Regulation Was Based And *Amici* Have Relied

Ownership of navigable airspace over privately-held property is subject to the public right of transit through that airspace. It has long been recognized that individuals do not possess the unilateral right to exclude others from navigable airspace over their property. In the Civil Aeronautics Act of 1938, 75 Pub. L. No. 75-706, 52 Stat. 973 (1938), Congress declared "a public right of freedom of transit in air commerce through the navigable air space of the United States." Justice Jackson succinctly observed that "the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

This well-settled legal view undergirds the substantial investments in, and development of, our nation's airports, their runways, and the airlines and private aircraft operators who use them. It has produced the safest, most efficient, and most productive engine of air commerce and travel in the world. The ruling below, by contrast, imposes a huge financial burden of potentially billions of dollars on one of the nation's major airports, a burden which could not have been foreseen under the legal standard that governed during its creation, development, and expansion. That substantial burden, itself, will have a significant impact on the National Aviation System because of its adverse consequences for the economic vitality of McCarran International Airport, for the future development and

expansion of runways and airports throughout Nevada, and for the ripple effect it will have around the nation.

1. Congress has established a right to public travel through navigable airspace based on its recognition that safe travel through navigable airspace furthers both the national interest and the public welfare of communities served by air travel. 49 U.S.C. § 40103(a)(2). First, Congress has provided that it is the policy of the United States "that the safe operation of the airport and airway system is the highest aviation priority," 49 U.S.C. § 47101(a)(1), and has charged the Federal Aviation Administration (FAA) with responsibility to "maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." *Id.* § 40101(a)(3). Second, Congress has called for "promoting, encouraging and developing civil aeronautics and a viable, privately-owned United States air transport industry," *id.* § 40101(a)(14), in large part through encouragement of airport proprietors to undertake improvements that increase capacity, safety and efficiency. *See id.* § 47101(a)(7). Finally, Congress has stated that it is the policy of the United States "to ensure that nonaviation usage of the navigable airspace *be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system.*" *Id.* § 47101(a)(8) (emphasis added).

Before the ruling in this case, all those involved in the air transportation industry, *i.e.*, the users of the National Aviation System represented by *amici,* the FAA, and virtually all landowners adjacent to our nation's airports, shared a common legal view that the airspace below 500 feet above ground level (AGL) in uncongested areas that was necessary for the safe takeoff and landing of airplanes was open to the flying public and could be regulated to prevent future uses that would create a hazard to air navigation. Indeed, current federal law defines navigable airspace in this manner. *See* 49 U.S.C. § 40102(a)(32); 14 C.F.R. § 91.119 (qualifying the regulation of minimum safe altitudes to allow lower flight "when necessary for takeoff or landing").

Whether nonaviation usage of airspace below 500 feet AGL can be accommodated without a decrease in the safety and capacity for takeoffs and landings in the National Aviation System is context-specific and must be made on a case-by-case basis. *See generally* 14 C.F.R. Pt. 77. In addition to the most obvious concern that airplanes must be able to avoid collision with buildings on takeoff and landing, the existence of such structures can create visual hazards, such as lighting or glare that make it difficult for pilots to see the landing approach. Similarly, tall buildings can cause radio signal interference with an airplane's navigational equipment or an air traffic controller's radar.

2. The FAA implements the federal laws and policy described above in conjunction with state and local governments through a program of cooperative federalism. The FAA is the regulatory authority in the United States charged with ultimate responsibility for the movement of aircraft both on the ground and in the air. The FAA, however, generally leaves to local governments the responsibility to ensure that land use and zoning ordinances are in place to protect the National Aviation System.

Although the FAA does not establish or operate airports, it provides significant federal funding to build, maintain, and expand airport facilities through Airport Improvement Program grants from the Aviation Trust Fund. In doing so, the FAA relies upon the certification from a grant recipient that that recipient has taken appropriate action to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations. 49 U.S.C. § 47107(a)(10). Petitioners have made that certification to the FAA repeatedly over time with regard to their operation of McCarran International Airport in Las Vegas and, in return, have received $155 million from the federal government over the past ten years to allow that airport to better serve the traveling public. Pet. 18.

One example of how the system operates in a manner that accommodates divergent interests is with regard to

matters of noise. At the direction of Congress, the FAA, after consultation with the Environmental Protection Agency and other appropriate agencies, has developed standards for noise levels that have been determined to be incompatible with certain kinds (*e.g.*, residential) of land use. 49 U.S.C. § 47502(3); 14 C.F.R. Pt. 150. With the FAA's support and following FAA's guidance and methodology, airport operators may prepare community maps of aircraft noise exposure identifying the areas of incompatible uses, based on the federal standards. 49 U.S.C. § 47503; 14 C.F.R. § 150.21. These maps in turn may be used by land use authorities as the basis for zoning or other land use requirements intended to prevent development in these areas of new incompatible uses. *See* FAA, *Advisory Circular: Noise Control and Compatibility Planning for Airports*, A/C 150/5020-1 at 8 (1983).

Before the decision below, a similar system was in place for concerns about airplane safety. To ensure uniform determinations regarding safe nonaviation use of navigable airspace, the FAA has developed advisory procedures for airports and landowners. The FAA requires that it be notified when anyone proposes to build or alter specified structures near an airport, 14 C.F.R. § 77.13, and the FAA then conducts aeronautical studies to determine whether the structure would constitute an actual hazard to aviation.[2]

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[2] The FAA will find that development is a hazard only if the aeronautical study results in a finding that the adverse impact on the safe and efficient use of the airspace, facilities, or equipment is substantial. In conducting the study, the FAA is required to consider factors relevant to the efficient and effective use of the navigable airspace, including: (A) the impact on arrival, departure, and en route procedures for aircraft operating under visual flight rules; (B) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules; (C) the impact on existing public-use airports and aeronautical facilities; (D) the impact on planned public-use airports and aeronautical facilities; and, (E) the cumulative impact of the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures. 14 C.F.R. §§ 77.31-.39

In most instances, if the FAA determines that proposed construction may pose a safety concern, local land use authorities look to that determination to ascertain the extent of use that is consistent with public safety and welfare, and the interested parties are able to work out a solution that best meets the needs of the various interests at stake. The FAA thus "negotiate[s] with the proponent [of the construction] during the study process to resolve any adverse effect(s) on aeronautical operations." FAA, *Advisory Circular: Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, A/C 70/7460-2K at 6 (March 1, 2000). The FAA specifically explains that "[m]any times, a minor reduction in height and/or relocation of a proposed structure will eliminate or sufficiently minimize adverse aeronautical effects that would permit the issuance of a Determination of No Hazard to Air Navigation." *Ibid.*

3. The court below did not correctly construe this federal law or policy. The court treated the airspace below 500 AGL as if the federal scheme placed that airspace exclusively in private hands, regardless of whether such space is necessary for safe takeoff or landing. The court incorrectly reasoned by negative inference that, if airspace *above* minimum altitudes (by regulation, 500 feet in uncongested areas, 14 C.F.R. § 91.119(c)) is necessarily in the public domain, ownership of airspace *below* that level must rest with the private landowner, immune from any reasonable limits on use. This interpretation reads out of the regulation and statute the qualifying language regarding airspace that is necessary for safe takeoff and landing.

The ruling dramatically changes the legal landscape for every *amicus*, including airports, air carriers and their customers, other commercial and private aircraft operators, as well as all other users of the National Aviation System. That System cannot function if courts and juries are able to impose massive fiscal liability on state and local entities who seek to comply with the views of the expert federal agency. The mere prospect of such liability would discourage tens of thousands of relevant

state, regional, and local entities from fulfillment of their role in this interrelated system.

C. The *Per Se* Taking Ruling Imperils the National Aviation System And Undermines The Predictability And Reliability Of That System On Which Both Commerce And Individual Passengers Rely

1. *Amici*'s members are greatly concerned about the consequences of the flawed ruling below. Aircraft travel takes place within a highly regulated, closely monitored, and intricately complex air transportation system. The ruling below will foster the development of a patchwork of state rules, in Nevada and likely beyond, regarding whether airspace can be transited without a monetary payment.

Owners of land near airports will become toll collectors with power to shut down or seriously limit community access to the National Aviation System, regardless of the substantial public benefit that results from the challenged safety restrictions. Airport operators necessarily will engage in a different calculus when faced with a hazard determination from the FAA, depending on the legal rules in their State. Rather than work out an approach that reasonably accommodates all relevant interests, airport operators in States that follow Nevada's reasoning will have to assess the likelihood of potential takings liability in a wholly different manner from those in States that continue to recognize the legitimate use of zoning authority to prevent construction of airport hazards.

2. There are not enough resources available to local governments to respond to every potential claim and to pay the owner of every parcel of land that might be affected by the legal analysis of the court below. As demonstrated by petitioners in the *certiorari* petition, a *per se* taking approach to safety-based height restrictions will add billions of dollars to the operation costs of many airports. For example, with regard to McCarran International Airport alone, respondent has been awarded $6.5 million in compensation and more than $10 million in interest, fees,

and costs, for an inability to erect a building that is taller than 66 feet. Six other property owners had similar claims pending against McCarran International Airport in state court during the pendency of this litigation.

The size of this windfall award is likely to generate additional claims against petitioners. *See* Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, The Las Vegas Sun, May 28, 2003 (noting that "there are 3,554 acres within a 20,000-foot radius of [McCarran] airport boundaries that have zoning similar to that of the land on which damages were awarded"). Indeed, two more cases against McCarran International Airport were filed virtually contemporaneously with the Nevada Supreme Court's opinion. Moreover, the Nevada court's novel holding, purportedly relying as it does on this Court's takings precedent, serves up a compelling financial incentive for a flood of follow-on demands by would-be litigants to compensate for a taking of "their" airspace within a mile or two or more of every airport in the country where zoning height restrictions have been adopted in the interest of safety.

Airport operators in States where compensation is required for any height restriction below 500 feet AGL may be unable to maintain or expand existing airports or to build new airports. If petitioners must spend at least $10 billion to keep McCarran International Airport operating in its current manner, petitioner Clark County will not have the funds to develop a second regional airport that is needed to meet consumer demands. *See* Pet. 16-17. Furthermore, where airports may be liable, or are uncertain about the risk of liability, for a *per se* taking based on *any* building restriction, no matter how reasonable, they are likely to delay or cancel needed airport improvements and capacity enhancements.

3. When airports are not operating at, or near, capacity due to fear of *per se* takings liability, airport operators in neighboring States, in turn, may not be able to keep up with regional demand. Airline investment in routes that serve these airports and in larger aircraft to serve those routes may be lost due to uncertainty about

the airport's continuing ability to accommodate landing and takeoff requirements. Concern about increased landing fees and related charges associated with the payment of claims or the purchase of airspace rights will likely adversely affect airline decisions to provide new or additional service to airports.

Unconstrained construction adjacent to airports can have other direct, adverse effects on airport capacity as well. For example, new structures may present safety issues because they would require aircraft to climb more rapidly on departure. The only way to achieve safe clearance of those new structures may be to lower aircraft takeoff weight by either reduction of the number of passengers and cargo, or by restriction on the amount of fuel the aircraft carries, thereby reducing the aircraft's range of flight.

Even when a building does not interfere with the most common landing path used by airplanes, the safety of air travel can be implicated when a building extends into a landing path that planes are supposed to use in bad weather or under other unusual circumstances. *See* David Hasemyer, *Is Office Tower's Height A Hazard?,* The San Diego Union-Tribune, Nov. 5, 2006. If other landowners also build around the airport, the airlines would be forced constantly to develop new emergency procedures to avoid the increasing number of obstacles.

4. The adverse impact extends far beyond airports in large Nevada cities, such as Las Vegas and Reno. There are 52 airports open to the public in Nevada. Forty-seven of them are publicly owned (the balance are privately owned but open to the public), and 31 are in the FAA's National Plan of Integrated Airport Systems and have received and are eligible to receive considerable federal airport aid devoted to development and maintenance of a national system of airports. These smaller Nevada airports are critical to retention of vital industries within the communities served by those airports. These modest, but effective, airport facilities provide essential air travel between otherwise remote places and centers of commerce.

These airports, for the most part, were never designed, however, to ensure that small aircraft (*e.g.*, the Cessnas, Pipers, and Beechcrafts) using these fields would be able to reach 500 feet altitude before leaving the airport's boundaries and flying over adjacent lands. Nevertheless, the Nevada Supreme Court ruling would appear to render reasonable height regulations at such smaller airports untenable as well.

The lower court's holding appears to be wholly unworkable for the nation's smaller privately-owned airports. These private airports, which lack zoning authority, would be required under the decision below to purchase air rights (even where there is no evidence that air traffic affects the landowners' use of the land). Indeed, air traffic in the area could face paralysis if one landowner refuses to sell an easement. Many such airports would be forced to cease operation, further compromising the National Aviation System.

Loss of such airports would affect not only the general aviation community based at those facilities, but also the cities and towns that currently rely on those airports for overnight package deliveries of urgent goods, medical supplies, and other shipments too critical to send by ground transportation.

5. The creation of such uncertainty and unpredictability in the capacity and development of our National Aviation System will have direct and indirect adverse consequences for commerce and the traveling public.

General economic growth of the nation and its local communities has increased the demand for air transport. Changed public expectations and new business models have accelerated that demand and served to establish safe, efficient air transportation as a lynchpin of the public welfare. The traveling public – families, individuals, and private and public organizations – have come to expect safe, reliable, and affordable commercial air transportation as an integral part of their daily lives.

At a minimum, national commerce and the traveling public will be saddled with increased costs that must be

passed on by airports subject to *per se* takings liability for safety based regulations, and the increased costs likely will be for less service.

Ii. The *Penn Central* Analysis Applies To Safety-Based Height Limitations Near Runways Because It Takes Into Account The Reasonable Investment-Backed Expectations Of The Landowner And The Character Of The Regulation Of Airspace

The three-factor analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), is the appropriate analysis to determine whether a taking occurred in this case. Unlike the *per se* taking analysis adopted by the Nevada Supreme Court, the *Penn Central* analysis allows a court to determine whether petitioners struck an appropriate balance between the accommodation of nonaviation usage of navigable airspace and the prevention of such usage if it would decrease the safety and capacity of the airspace and airport system. Petitioners have discussed the specific facts relevant to the first *Penn Central* factor and demonstrated the absence of any significant economic impact on the particular land at issue here. Pet. 25-26. The second and third *Penn Central* factors address more general matters of public importance which are of greater interest to *amici*.

A. Respondent held no reasonable investment-backed expectation that he could construct a building above the 66-foot high, four-story structure previously approved by petitioners on the land respondent purchased near the McCarran International Airport runway in the 1980s.

McCarran International Airport is typical of many airports where local authorities built the airport far away from substantial development, but development grew around the airport. In such circumstances, the landowners have no reasonable expectation of developing their property without regard for the operations of the airport. This is especially so when landowners benefited from the airport's development in the first place. *See Suburban*

O'Hare Comm'n v. Dole, 787 F.2d 186, 200 (7th Cir.) ("Petitioners conceive of themselves as the innocent, passive victims of a relentlessly expansive O'Hare. * * * In all fairness, however, these same communities receive enormous economic benefits from their proximity to O'Hare."), *cert. denied*, 479 U.S. 847 (1986). Thus, for example, "[a]t airports like Westchester and those in Newark and Teterboro, N.J., 'it is almost impossible to expand * * * because many developers have built right up against airport fences.'" Elsa Brenner, *Many Private Planes To Store, But Not Enough Hangars*, The N.Y. Times, Dec. 27, 2006 (quoting James K. Coyne, president of the National Air Transport Association).

B. This Court recently reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), the significance of the character of the governmental action in the *Penn Central* analysis. The Court emphasized that it is important whether a challenged government regulation "amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* at 539 (quoting in part *Penn Central*, 438 U.S. at 124).

Certainly, regulations that restrict the height of future buildings on previously undeveloped land near pre-existing airport runways constitute a public program that benefits the common good. The regulations impose a limited economic burden that promotes the common good by safeguarding the life and property of both those who travel in aircraft and those who occupy the buildings below.

Height regulations near airports that reflect federal criteria also promote the common good because they support a national standard. They are based in part on FAA hazard determinations and are an integral part of the scheme of cooperative federalism that governs our National Aviation System. This Court has recognized the need for a comprehensive approach to airspace management, explaining that local constraints on aircraft operations can cause an increase in "congestion and the concomitant

decrease in safety." *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624, 639 (1973). Such a system cannot function if courts and juries are able to impose massive fiscal liability, as in the instant case, on state or local entities who seek to comply with the views of this expert federal agency. The risk of such liability would discourage thousands of state and local entities that have zoning authority near airports from adoption or enforcement of land use standards that protect the safe and efficient operation of the national air transportation system.

CONCLUSION

For the reasons set forth above and to ensure the safe, secure, and economical use of our National Aviation System, the Court should grant the petition for a writ of *certiorari*.

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